IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JEROME STEVEN TALLEY, a/k/a Azizuddin Salahud-Din, Appellant.	)))))))))))	NO. 62792-9-I DIVISION ONE UNPUBLISHED OPINION FILED: April 19, 2010

Leach, J. — Jerome Steven Talley, also known as Azizuddin Salahud-Din, challenges his conviction for the delivery of heroin within 1,000 feet of a school zone and the imposition of a mandatory DNA (deoxyribonucleic acid) collection fee. He argues (1) that an ex parte communication between the judge and jury outside his presence warrants reversal, (2) that the sentencing court's application of the amended DNA collection fee statute violated the saving statute and the federal and state prohibitions against ex post facto laws, and (3) that defense counsel's failure to challenge the DNA collection fee statute deprived him of effective assistance of counsel.

We disagree. The court's communication was harmless beyond a reasonable doubt. Because the DNA collection fee statute is not punitive, its

application violated neither the saving statute nor the constitutional prohibitions on ex post facto laws. And because the court appropriately applied the law, counsel was not ineffective for failing to object to the DNA collection fee. Therefore, we affirm.

Background

On October 22, 2007, Salahud-Din was arrested in a "buy-bust" operation for selling black tar heroin in downtown Seattle. He was charged with delivery of heroin within 1,000 feet of a school bus stop in violation of the Uniform Controlled Substances Act, chapter 69.50 RCW.

Salahud-Din's trial commenced the following April. Waiving his right to counsel, he proceeded pro se.[1] In pretrial motions, the court reserved judgment on whether evidence of an earlier conviction for burglary in the second degree could be used for impeachment purposes.

At trial, the State moved to admit exhibit 2 into evidence after Officer Fox, the "buyer" officer, testified that it contained the material purchased from Salahud-Din and that it field tested positive for heroin. Salahud-Din objected for lack of foundation, and the court deferred admission pending testimony from the State's forensic scientist, Mr. Strongman. Strongman testified that he examined the material in exhibit 2 and that it tested positive for heroin. The court then admitted exhibit 2 into evidence. Attached to this exhibit was a weight receipt dated August 2007. Salahud-Din never objected to the admission of exhibit 2 on

[1] Salahud-Din was represented by counsel at the sentencing hearing.

the basis of the weight receipt date.

During Salahud-Din's direct examination testimony, he claimed that Officer Jokela informed him that he was being arrested for drug traffic loitering. But Officer Jokela was not the arresting officer, nor was he ever mentioned during the State's case in chief. The prosecutor, on cross-examination, then questioned Salahud-Din about Officer Jokela's involvement in a separate arrest.

> Prosecutor: I just want to clarify something because several times, several times during your testimony you talked about Officer Jokela; is that right?
> . . . .
>
> Salahud-Din: Yes, and he rides on a bicycle.
>
> Prosecutor: And you said that he placed you under arrest for drug traffic loitering?
>
> Salahud-Din: It was him and Larrabee.
> . . . .
>
> Prosecutor: - - are you talking about on October 22nd of 2007?
>
> Salahud-Din: If I remember it was October - - October 22nd of 2007.
>
> Prosecutor: But in this case do you remember it was Officer Bailey who came in and testified?
> . . . .
>
> Prosecutor: So you're sure that you are not confusing the conversation with Officer Jokela with some other incident?
>
> . . . .
>
> Prosecutor: Now, I just asked you about confusion because you have been a defendant in criminal court before, haven't you?
>
> Salahud-Din: Come again?
> . . . .

> Court: [Prosecutor, you] need to ask the proper foundation.
>
> Prosecutor: Yes, your Honor. [Turning her attention back to Salahud-Din] You have been convicted of a crime in the past?
>
> Court: You need to ask the specific.
>
> Salahud-Din: Could I get an objection to that question?
> . . . .
>
> Prosecutor: You have been convicted of a second degree crime?
>
> Salahud-Din: Excuse me?

At this point, the trial judge interrupted cross-examination, excused the jury, and ruled outside of the jury's presence that Salahud-Din's burglary conviction could no longer be used to impeach him. The judge reasoned that Salahud-Din had not fully understood the risks attendant with taking the stand.

Afterward, the court reconvened the jury and gave the following instruction:

> There was a question asked about a crime, and that question, which is not evidence anyway, because there is no answer to it, is stricken. . . . So that evidence is stricken and should be disregarded by you in your deliberations.

No additional cross-examination took place.

While deliberating, the jury submitted the following question to the court: "There is a date (8/21/07) on a weight receipt attached to the back of State's Exhibit #2: what does it refer to, and can we get clarification?" Without contacting either party, the court directed the jury to "rely upon the evidence presented in court for your deliberations."

The jury found Salahud-Din guilty as charged. At sentencing, the court

waived all nonmandatory fees and imposed, among other conditions, a $100 DNA collection fee. This appeal followed.

Analysis

We first address whether the court's response to the jury's question about exhibit 2 was an ex parte communication warranting reversal.

Generally, it is error for the court to have ex parte communications with the jury outside the defendant's presence.[2] But some improper communication may be so inconsequential as to constitute harmless error.[3] Though the State ultimately bears the burden of proving the challenged communication was harmless beyond a reasonable doubt, the defendant must first establish the possibility of prejudice.[4]

Here, the jury asked for clarification on the meaning of a date accidentally attached to a weight receipt, and without notifying either party, the trial court instructed the jury to rely on the evidence presented. As the State properly concedes, the trial judge's instruction to the jury under these circumstances was improper.

Salahud-Din points to the weight receipt to raise the possibility of prejudice. He claims that the jury may have inferred that he participated in a narcotics transaction on August 21 from (1) the weight receipt date, (2) his

[2] State v. Bourgeois, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997).
[3] Bourgeois, 133 Wn.2d at 407.
[4] Bourgeois, 133 Wn.2d at 407; State v. Caliguri, 99 Wn.2d 501, 508-09, 664 P.2d 466 (1983) (holding ex parte communication between judge and jury was error but overruling prior case law holding that ex parte communications were conclusively presumed prejudicial).

references to Officer Jokela, and (3) the State's aborted impeachment attempt. He claims that this inference, if drawn, would be highly prejudicial.

We disagree. This claimed prejudice is too attenuated to have had any impact on the jury. But even if we grant the possibility of prejudice, the ex parte communication was harmless beyond a reasonable doubt.

First, we presume juries follow the court's instructions.[5] In this case, the court struck the prosecutor's questions and directed the jury to ignore any implication that Salahud-Din had a criminal past. No other evidence of a prior criminal conduct was presented. Second, given that the weight receipt date was inconsistent with other markings on the exhibit, the jury reasonably wanted to ask a clarifying question. But this does not suggest that the jury connected the weight receipt to any criminal history for Salahud-Din. Third, the State's evidence established that exhibit 2 contained the item Officer Fox purchased from Salahud-Din, that this item tested positive for heroin, and that the State's chain of custody over the item was unbroken from the moment it came into police control. For all the reasons stated above, we hold that the State has shown that the ex parte communication was harmless beyond a reasonable doubt.

We next address whether the trial court violated the saving statute[6] or the federal and state prohibitions against ex post facto laws.[7] Salahud-Din claims

[5] State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).
[6] RCW 10.01.040.
[7] See U.S. Const. art. I, §§ 9, 10; Wash. Const. art. I, § 23.

these violations occurred at sentencing when the court applied an amended version of RCW 43.43.7541 that became effective after Salahud-Din committed his crime.

RCW 43.43.7541, amended in 2008, governs the imposition of DNA collection fees. Before the 2008 amendment, this statute allowed a trial court to waive the $100 DNA collection fee if "imposing the fee would result in undue hardship on the offender."[8] But the amendment deleted this clause, making the DNA collection fee mandatory for all sentences imposed under chapter 9.94A RCW.[9]

We recently addressed the saving statute argument in State v. Brewster[10] and the ex post facto argument in State v. Thompson.[11] In each of these cases, we affirmed an application of the amended statute despite the fact that, like here, the defendant committed the offense before the amendment took effect. Our reasoning was the same in both cases: RCW 43.43.7541 is not punitive,[12] and since the saving statute and the ex post facto clauses apply only to criminal statutes, neither prohibits imposition of the mandatory fee provision in effect at

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[8] Former RCW 43.43.7541 (2002) read, "Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 . . . must include a fee of one hundred dollars for collection of a biological sample as required . . . unless the court finds that imposing the fee would result in undue hardship on the offender."

[9] Laws of 2008, ch. 97, § 3 reads, "Every sentence imposed under chapter 9.94A RCW for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars."

[10] 152 Wn. App. 856, 218 P.3d 249 (2009).

[11] 153 Wn. App. 325, 223 P.3d 1165 (2009).

[12] Brewster, 152 Wn. App. at 861; Thompson, 153 Wn. App. at 337.

the time of sentencing.[13]

Because Brewster and Thompson are controlling, the trial court properly imposed the DNA collection fee.

Lastly, Salahud-Din's ineffective assistance of counsel claim is meritless. Ineffective assistance of counsel occurs when the counsel's performance is deficient, and the deficient representation prejudices the defendant.[14] Because imposition of the DNA collection fee was required, Salahud-Din can show no prejudice resulting from his counsel's failure to object.

Conclusion

We affirm the trial court, holding that the trial judge's instruction responding to the jury question outside the defendant's presence was harmless error. We also hold that applying amended RCW 43.43.7541 did not violate either the saving statute or the federal or state prohibition on ex post facto laws.

[13] Brewster, 152 Wn. App. at 861 (since the DNA collect fee statute is not punitive, the saving clause does not apply, and the court properly applied the version in effect at the time of sentencing); Thompson, 153 Wn. App. at 337 (rejecting a claim that the federal and state constitutional prohibitions against ex post facto laws prevent an application of the amended version of the DNA collection fee statute in effect at the time of sentencing).

[14] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Finally, Salahud-Din has not established ineffective assistance from his counsel for failing to object to the DNA collection fee.

Leach, A.C.J.

WE CONCUR:

Meyer, J.P.T.

Dwyer, C.J.